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February 27, 2012

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Re: Response to the National Campaign Fund Interim Audit Report dated January 24, 2012

INTRODUCTION

Thank you for the opportunity to comment on the Federal Election Commission's staff audit of the National Campaign Fund (NCF). At the outset we wish to state that the staff of the FEC we worked with on this audit were highly professional and especially thorough. We believe we were completely transparent with the staff and hope that our cooperation assisted in obtaining a desirable result.

We would like to offer a few words at the outset about NCF. The facts of the audit show that NCF is a non-connected PAC that is not supported by any sponsoring organization such as a labor union or a corporation. There is no permanent staff, office, or office equipment. NCF was formed in 2008 with a fairly simple intention: to raise funds over a moderate period of time to allow it to participate in the General Election of 2008 by making direct contributions to candidates for Federal office. As such, NCF is the epitome of a "grass-roots" attempt to participate in the 2008 Federal elections.

NCF never intended to engage in any independent expenditures. The problem, however, is that the FEC believes, through its staff's interpretation of the rules, that NCF engaged in widespread independent expenditure activity. It really did not – the communications were all just fundraising letters sent to proven donors with no consideration at all to whether the recipient was even a voter. Yet the staff interpretation of "independent expenditure" was extended to NCF's fundraising letters, so special reporting rules "kicked in" that create a monstrous reporting requirement on the committee's fundraising letters, which, once again, is not supported by permanent staff or a large organization. Further, because of public disclosures, the FEC staff's interpretation of the applicability of the independent expenditure rules to direct mail fundraising misleads the public, and media reporters, to erroneously conclude, that NCF engaged in widespread "independent expenditure" activity when the nature of the activity had no regard to whether the recipient was a voter, when they lived, whether there was an election date approaching, and so on. NCF believes that if the FEC truly considers all the facts, it should agree, that NCF's fundraising letters are not independent expenditures and that it therefore had no requirement to file the 42 so-called "late reports" it apparently was tardy in filing.

NCF produced a variety of different direct-mail fundraising appeals during the 2008 cycle, through direct-mail and electronic mail, using the tried-and-true method of: test, and roll-out. In this regard,

NCF's direct-mail advisors obtained lists of proven donors to Republican and conservative causes for the committee, and we tested various different content appeals in the letters to these donors, and when there was response data showing success (contributions) to support a "roll-out" of the test to the whole list of potential donors, we did so.

The various tests and roll-outs included content with references to elected officials and Presidential candidates to clue the recipient audience that NCF was a conservative Republican PAC worthy of their support, but the purpose of the mailings themselves, and the facts surrounding the mailing, was not to intervene in any election by engaging in a true independent expenditure (i.e., an election communication intended to influence a vote in an election for or against a candidate). The facts demonstrate that the *timing* of all of NCF's mailings had absolutely no reference to the timing of primary elections during 2008; the *content* of the letters, other than sometimes including some words considered "express advocacy" by the FEC, did not urge the recipient audience to vote for any particular candidate. Instead, the focus of all the direct-mail was on making a contribution; the audience or list of recipient's mailed to was selected for its fundraising value, and with absolutely no consideration for its electoral value. For example, absolutely no emphasis was given and no inquiry made as to *where* the mailings would be sent (as in whether or not they were targeted to an electoral geography or a primary election state), or whether the recipients were even registered voters.

Eventually, after several months of testing and rolling-out many mailings, NCF obtained an "excess of revenue" over the cost of the mailings, and on achieving this "tipping point" of excess of revenue, funds began to be used to make a number of direct contributions to candidates. As the audit demonstrates, the professionals only received compensation when "excess of revenue" was achieved, and even then such compensation was reasonable and did not exceed the total of contributions to candidates. Today, NCF has no funds and no support, and the professionals involved in responding to this audit have volunteered all their time to comply with the FEC's requests in completing the audit.

NCF disagrees that any of its direct-mail fundraising mailings constitute "independent expenditures." The Commission defines an "independent expenditure" at 11 CFR 100.16 as a "communication" "expressly advocating" the election or defeat of a clearly identified candidate. While NCF's mailings mentioned elected officials and candidates, and did include words of express advocacy in some of the mailings, taken as a whole, NCF's mailings cannot be interpreted to be "communications" intended to expressly advocate. The facts of the audit demonstrate that the letters were clearly *not intended* to intervene in an election in their own right because they were created and sent without regard to an election; they did not include any real markers of a political election "persuasion" communication, and could not have any meaningful effect on an election, standing on their own, because the timing of the mailings had no bearing on any election and the recipient lists selected were not voter files. Thus, the expenditures' content, timing and distribution, and audience indeed served a fundraising purpose, but not an electoral purpose. The direct-mail "audience's" understanding was to be motivated to give a contribution to NCF; and not to vote for a particular candidate. As such, the letters are not independent expenditure "communications" because in no way did they advocate the election or defeat of a clearly defined candidate.

The FEC should not discourage "grass-roots" participation in Federal elections. Encouraging more public participation rather than less is seen as beneficial by all serious observers of the electoral process. Yet the FEC's complicated rules as evidenced in this case make it practically impossible for a grass-roots type movement, un-connected to established union or corporate monied interests, to rise up and be involved in the process. The FEC has implemented rules and its staff seems to have developed interpretative rules that greatly penalize essentially voluntary efforts to make a non-connected PAC meaningful, by burying the activity in expensive – and at the end of the day meaningless – reporting

requirements, which have the effect of misleading the public as to the nature of the activity engaged in. We respectfully request that in this case, the FEC interpret all of NCF's direct-mailing for what they are: fundraising letters, not independent expenditures. This will be a fair result and the right decision.

RESPONSE TO SUMMARY OF FINDINGS AND RECOMMENDATIONS

1) Misstatement of Financial Activity

We are amending the necessary reports to correct the misstatements.

Please note that we made every effort to record all transactions and that we believe the discrepancies occurred because of the cumbersome processing/reporting of activity by our outside vendors who processed the vast majority of our contributions and disbursements activity, and the timing/availability of the details/reports which we received from them. Also, please note that the report (on page 5) states: "Based on a limited review of available records, it appeared that all contributor information received by the vendor that processed deposits of contributions may not have been forwarded to the vendor responsible for the data entry".

2) Disclosure of Independent Expenditures – Reporting "Memo" Entries

Virtually all of our expenditures were spent on direct mail fundraising. For any one mail piece, there were several vendors involved (mail preparation, printing, list rentals, postage, etc.). Therefore there were also several invoices that related to any one mail piece. Each invoice had to be approved by the committee, then sent to the primary vendor for organization/dissemination. Subsequently, the mail piece was disseminated. Timeframes varied significantly between approval of the invoices, ultimate dissemination of the related mail pieces, and availability of the dissemination dates to the committee for recording the expenditures in the committee's records. In many instances, one invoice could also relate to more than one mailing. Therefore, it was virtually impossible to identify specific invoices with the actual dissemination dates of the related mail pieces. As such, the committee made the decision that it would be most prudent under the circumstances to record all expenditures when they were actually made, because it was virtually impossible to identify unpaid invoices with the dates the related mail pieces were disseminated.

3) Disclosure of Independent Expenditures

Foremost, in our opinion, as stated in the introduction, is that none of the expenditure issues raised in the report "influenced the outcome of the election" because in no way did they advocate for the election or defeat of a clearly identified candidate. We have responded several times to other FEC requests re: independent expenditures – the substance of our responses (and this response as well) is that we believe that our direct mail fundraising letters should be excluded from the definition of independent expenditures, and that the intent of the regulation was not to include direct mail fundraising expenditures as "independent expenditures". Please note that on page 3 of your report, it states: "...\$1,261,206 of these expenditures appeared to meet the definition of independent expenditure...". To us, that suggests that the definition is subject to interpretation even within the FEC.

Following are some of our related comments that were included in previous responses:

- Political fundraising letters that are not intended to influence a vote, not timed to a particular election, but which are intended solely to motivate a donation for the group (and which have words of express advocacy in them) should be excluded from the definition of independent expenditures for your extraordinary reporting purposes. When the FEC pushes administrative overhead activities like general fundraising into IE status, it creates a costly regulatory burden for small donor committees like ours that do not have the financial backing, permanent staff, or infrastructure to keep up with the filings. Hardly any public purpose is served by the extraordinary reporting requirements imposed on just a fundraising letter, and we believe the public is indeed misled by the artificial inflation in dollars spent on what we are required to report as IEs.
- It was never our intention to do independent expenditures. Even though some of the letters contained "words of express advocacy", the mailings were sent only for the purpose of raising money so that we could make contributions to candidates in the general election. This is evidenced by the timing and distribution of the mailings, which then could not be reasonably interpreted as independent expenditures. We did not consider them to be "independent expenditures," because their purpose was entirely for direct-mail fundraising to proven commercial conservative fundraising lists chosen for their fundraising potential and not for their voting impact.
- The NCF expenses incurred for independent expenditures consist of mailings to a broad list of potential contributors covering the entire United States in a repetitive "test" and "roll-out" program devised by our vendor Response Dynamics. These mailings are fundraising letters for the general election that happen to include content that is express advocacy. Their only purpose is "general" fundraising for the general election.
- In our view, characterization of these mailings as "independent expenditures" has the effect of greatly overstating and inflating the actual funds used by the organization to influence the election by express advocacy. The facts in this matter demonstrate that we initially characterized all the letters as "fundraising," and only changed the designation for reporting purposes after the FEC staff contacted us and insisted that appeals that included words of express advocacy MUST be reported as independent expenditures. We herein proffer that passing the content of the many different letters was not a practical solution for our small operation. We therefore made a decision to report ALL the letters as "independent expenditures" to placate the FEC staff. However, an unsuspected and dangerous result of that decision, (which we felt forced into by the FEC staff) was that it pushed the PAC into a reporting requirement it simply could not keep up with.
- In a discussion during the cycle with the *New York Times* reporter Michael Lou, he offered the opinion to us to the effect that the FEC's reporting requirement on NCF of these entirely fundraising letters as "independent expenditures" had the effect of misleading the public into thinking that this type of committee is making significant "fulfillment" expenditures when in fact all of the funds in the mailing program are simply being used for fundraising. We agree with that assessment.
- Reporter Thomas Edsall of the *Huffington Post*, asked us why the committee had reported, on the reports you are questioning, significant independent expenditures per the FEC forms

but that he had not seen equal independent expenditure fulfillment. We explained to Edsall that the answer to his question was that your requirements had the effect of distorting the actual level of independent expenditure activity by lumping strictly direct-mail fundraising into that category where it contains words of express advocacy. Edsall seemed to agree with that assessment in a telephone discussion with James Lacy. Edsall then wrote about NCF and another PAC in a story published August 11, 2008 which states in relevant part, in support of NCF's representations in this audit:

".....As of the most recent filing with the Federal Election Commission last June, the two PACS had a combined total of \$56,906.50 left in the bank, along with debts of \$15,060, for a net of \$41,846.50."

"Lacy, the treasurer of both committees, contended that there has been little spending on actual electioneering activities for a number of reasons. First and foremost, he said, "Neither of these two committees has gotten to the so called 'tipping point' where it actually has a profit. They haven't get to that point yet."

"In addition, he said, *"The entire effort of these two groups is focused on the general election in November, not earlier....(emphasis added)*. Even if revenue was ten times what it is -- or more -- right now, these groups would not be spending any serious funds on advertising, as we are good managers and correctly conclude it would be a complete waste of the donors contributions to do so."

Finally, according to Lacy, "The economy is in recession and as other parts of the economy have been affected, so has political giving through direct-mail. Because of the typically smaller margins on direct-mail fundraising, unless response rates and dollar amounts are high, the program can lose money. The economy has depressed both response rates and dollar amounts of contributions, at least from what we were hoping for."

"We have to raise a lot of dollars. Voters need a concrete message that is hammered and hammered again and again," Lacy said. Because of their weak fundraising this cycle, "We can't put together a viable budget," he said, adding almost wistfully, "If a theme catches, then we can roll with that."

MITIGATING FACTORS

Finally, we wish to inform you that The NCF has made the decision that the time requirements, coordination, and record keeping are sadly not worth the effort of continuing to participate. We continue to believe that the FEC should reform its excessive reporting requirements for grass-roots organizations that engage in direct-mail fundraising -- we stress that these letters are simply not independent expenditures. Nevertheless, we wish to inform you that we plan to terminate the committee after the audit is completed.

In further mitigation, NCF took steps to quickly and accurately submit amended reports to correct the misstatements of financial activity and also to provide the auditors with current bank statements intended to verify that our records and those of the bank are reconciled. As we stated above, every effort was made to accurately record all transactions at the outset, and the discrepancies were a result of the cumbersome processing and reporting of activity by outside vendors. As soon as the

discrepancies were pointed out to us, NCF took the time to make sure all reports were amended in a timely manner. We feel that our timely response to FEC inquiries and our complete cooperation with the FEC throughout this process, as well as our stated aim to close The NCF Committee, should be considered mitigating factors in considering any civil penalty assessed against NCF. The FEC has in the past acknowledged full cooperation and expeditious compliance with FEC requests to amend records as "a mitigating factor in determining an appropriate civil penalty" (Advisory Opinion 1995-19). We conducted the activity of the committee under the impression of our compliance with the FEC, and when we were notified of misstatements of financial activity, we cooperated with the FEC's investigation. Our aim was to participate fairly in the political process, not to mislead the FEC in any manner. We ask that our subsequent cooperation with the FEC and efforts to ensure accurate reporting of financial activity in the future are considered when assessing the penalty for violating the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "Barrett Garcia", followed by a long horizontal flourish.

Barrett Garcia
Assistant Treasurer
National Campaign Fund